95-814

(1)

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

CHARLES ATTEBERRY, *et al.*,

Petitioners,

vs.

THE MAUMELLE COMPANY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Does a developer qualify for the exemption found at 15 U.S.C. §1702 (a)(2) under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq*, by entering into a conditional contract to build a home at the buyer's option and at the buyer's expense?

LIST OF PARTIES TO THE PROCEEDING

Charles E. Atteberry; Janice Atteberry; Jack L. Avery; Neta Avery; Robert W. Balentine; Pamela Kay Balentine; Glenn E. Banks; Estate of John F. Barnard, Jr., deceased; Betty Jo Barnard; John M. Bates; Susan K. Bates; Sydney F. Baustian; Lovelle Baustian; Patrick J. Beck; Clovia J. Beck; Richard D. Berry; Joyce A. Berry; Jeff D. Blakley; Dorothy R. Blakely; Hubert H. Blanchard; Janive S. Blanchard; David Brewer; Susan Brewer; Anna M. Brizendine; William M. Brumley; Dea Joanna Brumley; Anolia Bynum; Robert Carlisle; Laura Carlisle; Gary D. Clark; Sarah J. Clark; Fred Cobin; Brenda F. Cobin; Bob Collins; Judy Collins; Elsie L. Creswell; Marvin W. Crow; Margaret Crow; Jimmy D. Curtis; Carolyn Curtis; Douglas W. Damron; Heidi W. Damron; Faith V. Dasher; George Davis; Carolyn Davis; Roy E. Davis; Connie W. Davis; Luis Fermin De Orbegozo; Harold R. Dixon; Freda E. Dixon; Robert E. Duncan; Christina E. Duncan; Eugene L. Dunn; Rhonda L. Dunn; The Estate of William C. Durham, deceased; Deann E. Durham Golden; Alfred L. Edwards; Dorothy M. Edwards; The Estate of Louis Evans, deceased; Thelma Evans; Marvin E. Faulkner; Elizabeth Faulkner; N.A. Finch; Naomi Finch; Jimmy L. Frizielle; Flora A. Frizielle; Howard L. Gadberry; Ernestine L. Gadberry; Frank C. Gantz; Belinda Gantz; Lynn L. Gaston; Ann Gaston; James A. Gatliff; Jo Ann K. Gatliff; H. Kelley Geurin, Jr.; Judy Geurin; Virgil Graybill; Rose Marie Graybill; Herb Green; Steven W. Grimes; Carolyn K. Grimes; James D. Haley; Tammi S. Haley; Richard Hall; Mary Lee Hall; Wesley C. Hamilton; Marianne Hamilton; Davis L. Harper; Patti J. Harper; John C. Harrington; Dorothy M. Harrington; Terry Hastings; Jan K. Hastings; Andy L. Hatley; Shirley Hately; Henry Heidelberger; Betty G. Heidelberger; Charlie W. Hollis; Victoria Gail Hollis; Dennis W. Hood; Sharon Hood; William A. Hughes; Carolyn Squires; L.D. Immel; Ina Immel; Gregory G. Jackson; William L.

Johnson; Debbie J. Johnson; William B. Johnston, Jr.; Frances M. Johnston; Lois M. Jones; Ronnie D. Jones; Carolyn G. Jones; Ben F. Jordan; Marie T. Jordan; Joseph W. Kelley; Glenda F. Kelley; Heidi Killough; Dwayne Lawrence; Stephanie Lawrence; Joseph A. Lercher; Lisa G. Lercher; Billy R. Lewis; Kathryn E. Lewis; Jerald L. Maggard; Anita Maggard; John D. Main; Clarice Main; Billy J. Martin; Scottie Martin; Jim Mashburn; Margie Mashburn; Billie J. Massey; Schevaun Massey; Kenneth E. McDearmon; Carol A. McDearmon; Jerry McDearmon; Clifton Mears; Luvenia Mears; Robert D. Merritt; Lynne Merritt; Brian K. Miller; Renee Miller; David A. Mitchell; Joanne Mitchell; Thomas C. Moore; Catherine Moore; Harrell G. Newman; Lenora G. Newman; Margaret J. Omholt; Riley O'Neal, Jr.; Patricia O'Neal; Shirley B. Paige; Larry R. Pasley; Alicia Pasley; Philip H. Peters; Alison Peters; Judy Pierson; John P. Pope; Metta W. Pope; Douglas W. Postell; Paulette E. Postell; Robert A. Potillo; Joy A. Potillo; Robert L. Redmon; Carolyn A. Redmon; J. Guilford Rice; C. Patricia Rice; Dennis A. Ritter; Elizabeth A. Ritter; David Rivera; Daphne Rivera; Norman C. Rogers; Caroline Rogers; Harold G. Ruple; Edward J. Sample; Barbara Ann Sample; Andrew B. Setliffe; Dorothy Setliffe; Allan D. Sharp; Helen E. Sharp; John L. Shelton; Susan T. Shelton; Dorothy J. Smith; Gary D. Smith; Margaret L. Smith; Michael R. Smith; Sheena D. Smith; Robert E. Smith; Sandra F. Smith; Webster D. Smith, Jr.; Sharon R. Smith; Michael L. Smyers; Jeanne M. Smyers; Allen Soo; Evelyn Soo; Marcus G. Speer; Patricia H. Speer; William R. Stewart; Rosemary Stewart; Michael R. Swedenberg; Terri A. Swedenberg; Hubert H. Temme; June Temme; Michael G. Temme; Margaret L. Temme; Bill Tucker; Betty Tucker; James R. Wage; J.B. Wage; Ronald L. Walker; Patricia A. Walker; Phillip J. Wallace; Suson E. Wallace Cox; Albert Weaver; Lillie Weaver; E. Philip Webb; Mary Ann P. Webb; Robert L. Weyant; Dorothy Weyant; Claude Wheeler; Claude Wheeler; Mollie Wheeler; Harry

Willcockson; Shelby Willcockson; Marsha E. Williams; James F. Wood; Dorothy M. Wood; David Woody; Beverly Woody; Albert R. Wright; Jane N. Wright,

Plaintiffs-Appellants,

Steven Barham; Kathleen Barham; Joseph L. Bolden; Barbara J. Bolden; Charles Breckinridge; Stephanie Breckinridge; Johnny E. Brian; Carolyn Pasierb; Howard L. Cartwright; Winifred Cartwright; James E. Chrestman, Jr.; Jewell Chrestman; The Estate of J.E. Chrestman, III, deceased; Anna Chrestman; Marcus E. Copeland; Claire Copeland; Kenneth Coyle; Aline Coyle; Ben Dickinson; Jackie Dickinson; Randy Edmonson; Mae Dean Edmonson; Paul L. Evans, Sr.; Mary Evans; Bruce K. Green; Judy Green; Rayburn Gunter; Shelah Gunter; Herman Harlan; Eunice Harlan; John W. Jackson; Kara L. Jackson; Seburn Jones; Elsie Jones; Robert E. Lea; Nancy Lea; Michael Miller; Carole Tante; Melvin Moore, Jr.; Shirley Moore; Tony M. Pipkin; Janice G. Pipkin; John Pollock; Barbara Pollock; Raymond Ross; Mark A. Rutherford; Chris Wilbourn Rutherford; Leon F. Stamps; Van Dora Stamps; Gary Vanderslice; Mary Vanderslice; James R. Weddle, Jr.; Glenda Young,

Intervenor-Plaintiffs-Appellants.

v.

Maumelle Company; Dehaven Todd & Company; Michael G. Todd; John W. DeHaven,

Defendants-Appellees.

v

Ronald D. Watson; Ronald Smith; Deborah Smith;

Movants,

Robert D. Holloway,

Objector.

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Charles E. Atteberry, and over one hundred and seventy five Co-Petitioners, respectfully Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 60 F.3d 415 (8th Cir. 1995). The opinion of the United States District Court for the Eastern District of Arkansas is unreported.

STATEMENT OF JURISDICTION

The Eighth Circuit entered its judgment on July 11, 1995. Petitioners filed a timely petition for rehearing on July 25, 1995. The Petition for Rehearing was denied on August 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case concerns the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* In particular, 15 U.S.C. § 1702(a)(2), which reads as follows:

> Unless the method of disposition is adopted for the purpose of the evasion of this title, the provisions of this title shall not apply to . . . the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

15 U.S.C. § 1702(a)(2).

STATEMENT OF THE CASE

Petitioners brought this action against Respondents alleging violation of the Interstate Land Sales Full Disclosure Act and common law fraud. Respondents moved for summary judgment asserting that they were exempt from the Interstate Land Sales Full Disclosure Act [hereinafter "ILSFDA"] pursuant to 15 U.S.C. § 1702(a)(2). For their exemption, Respondents rely on a provision of their sales contract (the building provision) (Appellant's Appendix, p. 104). Petitioners contended that the plain language of the contract did not meet the requirements of the exemption.

Respondents moved for summary judgment, contending that the "building provision" entitled them to the exemption. The provision, set out in the Appellants' Appendix in its entirety, essentially provided that the buyer was obligated to provide the seller with detailed plans and specifications for a home to be constructed on the lot. The seller would determine whether to approve the plans and specifications. If the seller did approve the plans and specifications, it was then the duty of the buyer to arrange financing for the improvement or to prove their ability to pay for the improvements. Only then would the seller be obliged to build a home on the lot within two years of the date of the contract. The buyer would be required to pay all costs of building, plus a ten percent surcharge. The buyer was required to pay costs incurred, plus the ten percent, on a monthly basis.

Under the contract provision outlined above, the Respondents' duty to build on the lot was contingent upon the buyer submitting plans which satisfied the Respondents. It was also contingent upon the buyer paying all of the seller's costs and expenses plus a surcharge of ten percent (10%).

Respondents moved for summary judgment, asserting that

the "building provision" entitled them to an exemption from IFSFDA. Petitioners contended that the ILSFDA exemption required an unconditional commitment on the part of the seller to build. The Respondents contended that their building provision was sufficient for the exemption. The United States District Court for the Eastern District of Arkansas granted the motion for summary judgment. Petitioners appealed to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit found that the statutory provision creating the exemption did not require that the seller's commitment be unconditional, and held that the requirements of the exemption could be met by a contractual provision to build a house at the buyer's option and expense. The court based its reasoning on the conclusion that 15 U.S.C. § 1702(a)(2) does not require an unconditional commitment to build.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Eighth Circuit permits a developer to escape the requirements of the Interstate Land Sales Full Disclosure Act [hereinafter ILSFDA] by inserting a provision in its sales contract whereby it will build a house at the buyer's expense and option. Such a provision can easily be placed in any contract. The developer undertakes no serious obligation, as a house can be built on any land on earth for costs plus ten percent. If the Eighth Circuit's decision is allowed to stand, it will be a simple matter for developers to avoid the requirements Congress chose to place on their industry.

"The general purpose of the Land Act was, of course, to prohibit and punish fraud in . . . land development enterprises . . . and the Act should be interpreted to attain that end. Such an act should be construed "not technically and restrictively, but flexibly to effectuate its remedial purpose.", *McCown v. Heidler*, 527 F.2d

204, 207 (10th Cir. 1975). "No legislative enactment should be rendered ineffective to attain its purpose if such a construction can be avoided." *Id.* "Exemptions to ILSFDA should be narrowly construed." *DeLuz Ranchos Invest., Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297 (9th Cir. 1979); *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990) ("exemptions from remedial statutes such as the Act are to be narrowly construed" *Id.* at 105). "The disclosure requirements of the Land Sales Act are designed to prevent fraud in interstate land transactions, and the Act should be liberally construed in favor of broad coverage to effectuate its remedial purpose." *DeLuz Ranchos*, *supra* at 1302.

Before the Eighth Circuit's decision in this case, the courts which considered the issue uniformly held that the developer must **unconditionally** commit to construct a building within two years. *Schatz v. Jockey Club Phase III*, 604 F. Supp. 557 (S.D.Fla. 1985); *Dorchester Development, Inc. v. Burk*, 439 So.2d 1032 (Fla. App. 1983); and *Arvida Corporation v. Barnett*, 502 So.2d 11 (Fla. App. 1986). Each case applies the requirement that the commitment be unconditional. Florida also applied the rule in *Hamptons Development Corporation of Dade v. Sackler*, 522 So.2d 1035 (Fla. App. 1988), and finally the Florida Supreme Court applied the rule in *Samara Development Corp. v. Marlow*, 556 So.2d 1097 (Fla. 1990).

The Supreme Court of Alabama has also applied the rule. *N & C Properties v. Windham*, 582 So.2d 1044 (Ala. 1991).

In *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990), the Third Circuit stated the issue as follows:

> Markowitz argues on appeal that Northeast is not exempt under the Act because her purchase agreement fails to include an unconditional commitment to complete

> construction of the condominium within two years.

Id.

Although the Third Circuit did not mention the "unconditional" requirement again, it is clear from the decision that it used the "unconditional" theory in reversing the district court.

While there are not many cases on point, a Westlaw search performed after this decision shows that only one court in the land has considered whether the commitment to build required for the exemption under the Act must be "unconditional" and decided that it need not be. That court is the Eighth Circuit.

If the Eighth Circuit's decision is allowed to stand, it will be a simple matter for real estate developers to avoid the coverage of the Interstate Land Sales Full Disclosure Act simply by agreeing to act as contractors. The entire regulatory apparatus carefully designed by Congress will be swept away by a simple paragraph of boilerplate and an illusory agreement to do what anyone could do. In order to protect land purchasers throughout the nation, this Court should grant certiorari and reverse the decision of the Eighth Circuit.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ORDER DENYING APPELLANT'S PETITION FOR REHEARING FILED OF RECORD AUGUST 24, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2349EALR

Charles E. Attebery, et al.,

Appellants,

vs.

Maumelle Co., et al,

Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas

The petition for rehearing filed by the appellants has been considered by the court and is denied.

August 24, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DECISION FILED OF RECORD JULY 11, 1995

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2349

Charles E. Atteberry; Janice Atteberry; Jack L. Avery; Neta Avery; Robert W. Balentine; Pamela Kay Balentine; Glenn E. Banks; Estate of John F. Barnard, Jr., deceased; Betty Jo Barnard; John M. Bates; Susan K. Bates; Sydney F. Baustian; Lovelle Baustian; Patricia J. Beck; Clovia J. Beck; Richard D. Berry; Joyce A. Berry; Jeff D. Blakley; Dorothy R. Blakely; Hubert H. Blanchard; Janive S. Blanchard; David Brewer; Susan Brewer; Anna M. Brizendine; William M. Brumley; Dea Joanna Brumley; Anolia Bynum; Robert Carlisle; Laura Carlisle; Gary D. Clark; Sarah J. Clark; Fred Corbin; Brenda F. Cobin; Bob Collins; Judy Collins; Elsie L. Creswell; Marvin W. Crow; Margaret Crow; Jimmy D. Curtis; Carolyn Curtis; Douglas W. Damron; Heidi W. Damron; Faith V. Dasher; George Davis; Carolyn Davis; Roy E. Davis; Connie W. Davis; Luis Fermin De Orbegozo; Harold R. Dixon; Freda E. Dixon; Robert E. Duncan; Christina E. Duncan; Eugene L. Dunn; Rhonda L. Dunn; The Estate of William C. Durham, deceased; Deann E. Durham Golden; Alfred L. Edwards; Dorothy M. Edwards; The Estate of Louis Evans, deceased; Thelma Evans; Marvin E. Faulkner; Elizabeth Faulkner; N.A. Finch; Naomi Finch; Jimmy L. Frizielle; Flora A. Frizielle; Howard L. Gadberry; Ernestine L. Gadberry; Frank C. Gantz; Belinda Gantz; Lynn L. Gaston; Ann Gaston; James A. Gatliff; Jo Ann K. Gatliff; H. Kelley Geurin, Jr.; Judy Geurin; Virgil Graybill; Rose Marie Graybill; Bruce K. Green; Judy Green; Herb Green; Steven W. Grimes; Carolyn K. Grimes; James D. Haley; Tammi S. Haley; Richard Hall; Mary Lee Hall; Wesley C. Hamilton; Marianne Hamilton; Davis L. Harper; Patti

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J. Harper; John C. Harrington; Dorothy M. Harrington; Terry Hastings; Jan K. Hastings; Andy L. Hatley; Shirley Hately; Henry Heidelberger; Betty G. Heidelberger; Charlie W. Hollis; Victoris Gail Hollis; Dennis W. Hood; Sharon Hood; William A. Hughes; Carolyn Squires; L.D. Immel; Ina Immel; Gregory G. Jackson; William L. Johnson; Debbie J. Johnson; William B. Johnston, Jr.; Frances M. Johnson; Lois M. Jones; Ronnie D. Jones; Carolyn G. Jones; Ben F. Jordan; Marie T. Jordan; Joseph W. Kelley; Glenda F. Kelley; Heide Killough; Dwayne Lawrence; Stephanie Lawrence; Joseph A. Lercher; Lisa G. Lercher; Billy R. Lewis; Kathryn E. Lewis; Jerald L. Maggard; Anita Maggard; John D. Main; Clarice Main; Billy J. Martin; Scottie Martin; Jim Mashburn; Margie Mashburn; Billie J. Massey; Schevaun Massey; Kenneth E. McDearmon; Carol A. McDearmon; Jerry McDearmon; Clifton Mears; Luvenia Mears; Robert D. Merritt; Lynne Merritt; Brian K. Miller; Renee Miller; David A. Mitchell; Joanne Mitchell; Thomas C. Moore; Catherine Moore; Harrell G. Newman; Lenora G. Newman; Margaret J. Omholt; Riley O'Neal, Jr.; Patricia O'Neal; Shirley B. Paige; Larry R. Pasley; Alicia Pasley; Philip H. Peters; Alison Peters; Judy Pierson; John P. Pope; Metta W. Pope; Douglas W. Postell; Paulette E. Postell; Robert A. Potillo; Joy A. Potillo; Robert L. Redmon; Carolyn A. Redmon; J. Guilford Rice; C. Patricia Rice; Dennis A. Ritter; Elizabeth A. Ritter; David Rivera; Daphne Rivera; Norman C. Rogers; Caroline Rogers; Harold G. Ruple; Edward J. Sample; Barbara Ann Sample; Andrew B. Setliffe; Dorothy Setliffe; Allan D. Sharp; Helen E. Sharp; John L. Shelton; Susan T. Shelton; Dorothy J. Smith; Dorothy J. Smith; Gary D. Smith; Margaret L. Smith; Michael R. Smith; Sheena D. Smith; Robert E. Smith; Sandra F. Smith; Webster D. Smith, Jr.; Sharon R. Smith; Michael L. Smyers; Jeanne M. Smyers; Allen Soo; Evelyn Soo; Marcus G. Speer; Patricia H. Speer; William R. Stewart; Rosemary Stewart;

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Michael R. Swedenberg; Terri A. Swedenberg; Hubert H. Temme; June Temme; Michael G. Temme; Margaret L. Temme; Billy Tucker; Betty Tucker; James R. Wage; J.B. Wage; Ronald L. Walker; Patricia A. Walker; Phillip J. Wallace; Suson E. Wallace Cox; Albert Weaver; Lillie Weaver; E. Philip Webb; Mary Ann P. Webb; Robert L. Weyant; Dorothy Weyant; Claude Wheeler; Claude Wheeler; Mollie Wheeler; Harry Willcockson; Shelby Willcockson; Marsha E. Williams; James F. Wood; Dorothy M. Wood; David Woody; Beverly Woody; Albert R. Wright; Jane N. Wright,

Plaintiffs-Appellants,

Steven Barham; Kathleen Barham; Joseph L. Bolden; Barbara J. Bolden; Charles Breckinridge; Stephanie Breckinridge; Johnny E. Brian; Carolyn Pasierb; Howard L. Cartwright; Winifred Cartwright; James E. Chrestman, Jr.; Jewell Chrestman; The Estate of J.E. Chrestman, III, deceased; Anna Chrestman; Marcus E. Copeland; Claire Copeland; Kenneth Coyle; Aline Coyle; Ben Dickinson; Jackie Dickinson; Randy Edmonson; Mae Dean Edmonson; Paul L. Evans, Sr.; Mary Evans; Rayburn Gunter; Shelah Gunter; Herman Harlan; Eunice Harlan; John W. Jackson; Kara L. Jackson; Seburn Jones; Elsie Jones; Robert E. Lea; Nancy Lea; Michael Miller; Carole Tante; Melvin Moore, Jr.; Shirley Moore; Tony M. Pipkin; Janice G. Pipkin; John Pollock; Barbara Pollock; Raymond Ross; Mark A. Rutherford; Chris A. Rutherford; Leon F. Stamps; Van Dora Stamps; Gary Vanderslice; Mary Vanderslice; James R. Weddle, Jr.; Glenda Young,

Intervenor-Plaintiffs-Appellants.

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v.

Maumelle Company; Dehaven Todd & Company; Michael G. Todd; John W. Dehaven,

Defendants-Appellees.

Ronald D. Watson; Ronald Smith; Deborah Smith;

Movants,

Robert D. Holloway,

Objector.

United States of America,

Amicus Curiae,

Ronald D. Watson; Deborah Smith; Ronald Smith,

Intervenors.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: December 14, 1994

Filed: July 11, 1995

Appendix B

Before BOWMAN and LOKEN, Circuit Judges, and BOGUE,* Senior District Judge.

BOWMAN, Circuit Judge.

This is an appeal from an order of the District Court[1] granting summary judgment and dismissing a claim brought under the Interstate Land Sales Full Disclosure Act (the Act), 15 U.S.C. §§ 1701-20 (1988 & Supp. V 1993), and also dismissing the plaintiffs' supplemental state law claims. We affirm.

I.

The plaintiffs are some 178 individuals and couples seeking to represent a class of approximately two thousand purchasers who bought lots from The Maumelle Co. (Maumelle) in Maumelle, Arkansas, over a multi-year period. While possessed of neither Florida swampland nor Arizona desert, each of the plaintiffs is nevertheless strong in the belief that his or her lot is not a happy one, and that the company sold these parcels of real estate "pursuant to a promotional plan that involved fraudulent misrepresentations." Brief of Appellant at 12. After a state court judgment in favor of lot owners Glenn and Cavonna Eskola was reversed and remanded for transfer to the chancery court due to lack of jurisdiction, *Maumelle Co. v. Eskola*, 865 S.W.2d 272, 275 (Ark. 1993), the plaintiffs brought the present lawsuit in the

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*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

1. The Honorable Henry L. Jones, Jr., United States Magistrate Judge for the Eastern District of Arkansas, presiding pursuant to the consent of the parties in accordance with 18 U.S.C. § 636(c) (1988).

District Court. As summarized by the court, their federal complaint alleges that

> they were induced to purchase property in the subdivision by false promises made by the sales agents, in violation of the [Act], and that defendants failed to provide a property report at the time the agreement to purchase the property was signed, also in violation of the Act; that the representations made by defendants' agents constituted fraud, deceit and misrepresentation; that the defendants are liable for breach of contract in that most of the improvements promised have not been completed; and that the actions of defendants constitute intentional infliction of emotional distress.

Soo v. Maumelle Co., Civ. No. LR-C-92-439, Memorandum and Order at 1 (E.D. Ark. April 15, 1994) (citation omitted). The complaint thus includes federal claims based on the Act as well as supplemental state law claims.

Defendants moved for summary judgment, contending that the Act does not apply to them by reason of the exemption set forth in 15 U.S.C. § 1702(a)(2) (1988), which provides:

> (a) **Sale or lease of lots generally**
>
> Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to —

Appendix B

. . .

> (2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

Defendants argued that they are protected by this exemption inasmuch as, subject to specified conditions, Maumelle was contractually obligated to each plaintiff to build a house on that plaintiff's lot within two years of the date of purchase.

In opposing defendants' motion for summary judgment and seeking summary judgment for themselves, plaintiffs contended that the contract provision at issue (the building provision) is insufficient to make the § 1702(a)(2) exemption available to defendants. Plaintiffs put forward two reasons for the nonapplicability of this exemption: (1) defendants used the building provision for the purpose of evading the Act and (2) the building provision did not unconditionally obligate defendants to build houses for the buyers within a period of two years.

The District Court, finding no genuine issues of material fact, held as a matter of law that the conditions in the building provision were merely "reasonable steps in the actual construction process" and "that the building provision in the sales contract at issue . . . was sufficient to create the exemption relied upon by defendants." Memorandum and Order at 5. Similarly, the court held that plaintiffs had not come forward with evidence requisite to show that defendants had adopted the building

provision for the purpose of evading the Act. Accordingly, the court granted defendants' motion for summary judgment, denied plaintiffs' motion for summary judgment, and denied plaintiffs' other pending motions as moot. The plaintiffs appeal, contending that the District Court erred in holding that defendants are entitled to summary judgment on the basis of the § 1702(a)(2) exemption. Plaintiffs essentially reiterate the arguments they made before the District Court.

II.

Plaintiffs' first contention is that error occurred when the District Court concluded that the building provision of the sales contract was sufficient to bring defendants within the ambit of the § 1702(a)(2) exemption from the requirements of the Act. The building provision is found in the "Special Conditions" section of the contract, and in one representative contract reads as follows:

> 6. Construction of Residential Home. Within 180 days of the date hereof, Buyer agrees to provide Seller with detailed plans and specifications of a home (the "Improvements") for construction by Seller on the Lot, consistent with the Bills of Assurance, and otherwise meeting the architectural requirements of the subdivision. Once Buyer's plans and specifications have been determined by Seller to meet the architectural requirements of the subdivision, Buyer shall arrange the construction financing necessary by reason of this agreement to pay the purchase price of the Lot and the Improvements set forth below (or, if

> no construction financing is required by Buyer to pay for the improvements, Buyer shall furnish Seller with satisfactory evidence of their ability to pay the purchase price of the improvements). Upon Buyer providing to Seller satisfactory evidence of construction financing, Seller agrees to construct on the Lot a residential home in conformity with plans and specifications presented by Buyer prior to two years from the date of this Real Estate Sale and Construction Contract. Buyer shall have the right to specifically enforce this Agreement against Seller or seek damages or any other remedies provided by law for breech [sic] of this Agreement by Seller. The purchase price for the Improvements being constructed by Seller shall be the sum of costs incurred by Seller plus 10% shall be due from Buyer to Seller monthly during construction. The costs of Seller are all costs incurred by Seller for the following items: [listing ten cost items including wages, materials, taxes, and so forth].

Real Estate Sale and Construction Contract and Installment Note between the Maumelle Co. and Clyde E. Byrd and Karen L. Byrd, Special Conditions ¶ 6 (Aug. 25, 1990). Plaintiffs, supported by the Department of Justice as *amicus curiae*, urge that the building provisions conditions precedent to the seller's obligation to build a house on the buyer's lot defeat the seller's eligibility for the § 1702(a)(2) exemption.

In making this argument, the government's *amicus* brief

relies extensively on guidelines regarding the exemption provisions of the Act issued by the Department of Housing and Urban Development in 1979. These guidelines are not mentioned in plaintiffs' briefs to this Court and plaintiffs do not appear to have placed any reliance on them at all, either here or in the District Court. We express doubt whether on appeal it is proper for an *amicus curiae* to urge reversal of a lower court on the basis of authority on which the party the *amicus* is supporting has placed no reliance at any stage of the litigation. We nevertheless have considered the guidelines, and we conclude that they are entirely consistent with the District Court's reading of the governing statute. Therefore, as the guidelines lead us toward affirmance rather than reversal of the District Court's decision, we need not and do not pause to survey the procedural difficulty alluded to above. The guidelines that the government has flagged for us provide in pertinent part as follows:

> If a seller (or developer) is relying on this exemption and the residential, commercial, condominium or industrial building is not complete, the contract must specifically obligate the seller to complete the building within two years. If the contractual obligation is not present, the sale is not exempt. The two-year period begins on the date the purchaser signs the sales contract. The use of a contract that obligates the buyer to build within two years would not exempt the sale.
>
> HUD's interpretation of what constitutes a two-year obligation to construct a building relies on general principles of contract law in deciding whether or not the seller has, in fact,

an obligation to erect a building within two years. Provisions for purchaser financing and remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located.

However, the contract must not allow nonperformance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. . . . Similarly, contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct. HUD's position is not that a right to specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated. . . .

Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected. . . .

Although the factual circumstances upon which nonperformance or a delay in performance is based may vary from

> transaction to transaction, as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control.

24 C.F.R. pt. 1710 app. A at IV(b) (1994). It is immediately apparent that while these guidelines say that the seller's obligation to build must be specific, they do not say, or even hint, that the obligation must be unconditional. Neither, of course, does the statute. Even so, plaintiffs and the *amicus curiae* argue strenuously that the building provision in the present case injects contingencies into the building process that negate the operation of the § 1702(a)(2) exemption. "[T]he Defendants' duty to build on the lot was contingent upon the buyer submitting plans which satisfied the Defendants. It was also contingent upon the buyer paying all of the seller's costs and expenses plus a surcharge of ten percent (10%)." Brief of Appellant at 20. Taking the second part first, it seems to us that this "contingency must be characterized as a"[p]rovision[] for purchaser financing" and thus, according to the HUD guidelines, a matter "to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located." 24 C.F.R. pt. 1710 app. A at IV(b). Thus the guidelines themselves adopt the position that a provision for purchaser financing is not the sort of contingency that defeats the statutory exemption. Moreover, plaintiffs do not suggest that construction contracts based on cost plus ten percent are in any way contrary to Arkansas law.

The submission of architectural plans is a closer call. It is not correct, however, as plaintiffs argue, that approval of the plans is at the unfettered will of the seller. According to the language of

the building provision, the buyer submits plans "consistent with the Bills of Assurance, and otherwise meeting the architectural requirements of the subdivision." Thus the contract creates an objective standard by which the plans the buyer submits are to be evaluated by the seller. The question is whether this allows "nonperformance by the seller at the seller's discretion." 24 C.F.R. pt. 1710 app. A at IV(b). We think it does not. Arkansas case law is clear that contracts are to be construed reasonably so as to carry out the intentions of the parties. *Eason v. Simon,* 23 S.W.2d 986, 987 (Ark. 1930); *Singer Sewing Mach. Co. v. Brewer,* 93 S.W. 755, 756 (Ark. 1906). Further, when conditions are placed on a contract, the parties have a duty to make a reasonable effort and to accept reasonable terms in order to satisfy these conditions. *See Betnar v. Rose,* 536 S.W.2d 719, 723 (Ark. 1976). The building provision therefore cannot properly be regarded as an invitation for the seller to evade its contractual obligation at will. This conclusion is supported by the fact that the building provision gives the buyer the remedy of specific performance as an alternative to damages or other remedies for breach of contract, thus emphasizing that the provision contemplates a binding obligation on the part of the seller.

In sum, we agree with the trial court that "the 'conditions' cited by plaintiffs [are] reasonable steps in the actual construction process" and do not "negate the rights of the purchasers." Memorandum and Order at 5. We conclude that the building provision is sufficient to make defendants eligible for the § 1702(a)(2) exemption.

III.

Plaintiffs contend that, even if the building provision is sufficient to qualify defendants for the § 1702(a)(2) exemption,

the trial court erred when it found there was not substantial circumstantial evidence that the defendants adopted the building provision of the contract with the intent to evade the Act. Section 1702(a) states in pertinent part that the provisions of the Act shall not apply to the exceptions enumerated, "[u]nless the method of disposition is adopted for the purpose of evasion of this chapter." The District Court noted that both parties have agreed that this is a case of first impression in any court as regards interpretation of this phrase. *See* Memorandum and Order at 7.

The statutory language at issue refers to evasion "of this chapters and thus, we conclude, to bad-faith use of the enumerated exceptions in order to evade the Act's purpose. Sister circuits have variously defined this purpose as "to prohibit and punish fraud in . . . land development enterprises," *McCown v. Heidler,* 527 F.2d 204, 207 (10th Cir. 1975), or "to insure that a buyer, prior to purchasing certain kinds of real estate, is informed of facts which will enable him to make an informed decision about purchasing the property," *Law v. Roval Palm Beach Colony, Inc.,* 578 F.2d 98, 99 (5th Cir. 1978). Even a good-faith use of the enumerated exceptions arguably could be viewed as an evasion of the Act, but we think the phrase "adopted for the purpose of evasion of this chapter must be read more narrowly and confined to use of the enumerated exceptions with fraudulent intent. Accordingly, we hold plaintiffs must show that, in including the building provision in the standard sales contract, defendants acted with fraudulent intent, *i.e.,* that at the time of contracting they did not intend for Maumelle to fulfill its obligations under the building provision.

The case of *Maumelle Co. v. Eskola,* 865 S.W.2d 272, in which the jury found defendants guilty of fraudulent practices, was reversed on jurisdictional grounds. It therefore is a nullity,

and does not have any preclusive effect in the present action. As to the record in the present proceeding, and as the District Court found, the testimony given by defendant Jay DeHaven at his deposition that he sold property under an exception to the Act to allow it to be priced more competitively, standing alone, does not constitute evidence that he fraudulently attempted to evade the Act. The testimony of Maumelle employees Judy Pickens and Mary Peyton, given under oath at the *Eskola* trial and interpreted by plaintiffs to show a fraudulent intent, indicated that Maumelle, although it did not construct any houses, worked closely with lot owners in planning houses and obtaining bids for their construction. Similarly, the *Eskola* testimony of lot owner Jeffrey Ellison that Maumelle did not comply with the building provision actually shows a more complex series of events in which the company's attempt to assist in planning was stymied by subsequent disagreements. Testimony by the building inspector for the city of Maumelle as to the number of houses constructed was viewed by the District Court, correctly we think, as not probative or fraud.

> This number necessarily depended upon the number of persons who wanted to build and who submitted plans. There is no evidence in this record, other than Mr. Ellison's situation, that defendants discouraged building or refused to build homes in Maumelle. On the other hand, all of the defendants testified they encouraged building and that home construction added to the value of the properties.

Memorandum and Order at 9. Finally, the testimony by Glenn Eskola at his trial that Maumelle's salesmen removed the

building provision from his contract in order to close the sale, while not discussed by the District Court, does not appear to be probative of fraud. We conclude, as did the District Court, that plaintiffs have failed to show there is a genuine issue for trial on the issue of fraudulent intent. *See* Fed. R. Civ. P. 56(c). We concur with the District Court that the evidence submitted by plaintiffs in opposition to defendants' motion for summary judgment is not probative on the issue of evasion.

IV.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C — UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS JUDGMENT FILED OF RECORD APRIL 15, 1994

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-92-439

ALLEN SOO, et al.

PLAINTIFFS

v.

THE MAUMELLE COMPANY, et al.

DEFENDANTS

JUDGMENT

Pursuant to the Memorandum and Order entered in this matter on this date, it is Considered, Ordered and Adjudged that this case be, and it is hereby, dismissed. The relief sought is denied.

IT IS SO ADJUDGED this 15th day of April, 1994.

s/ Henry L. Jones, Jr.
United States Magistrate Judge

APPENDIX D — UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS MEMORANDUM AND ORDER FILED OF RECORD APRIL 15, 1994

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil No. LR-C-92-439

ALLEN SOO, et al.

PLAINTIFFS

v.

THE MAUMELLE COMPANY, et al.

DEFENDANTS

MEMORANDUM AND ORDER

Now pending are plaintiffs' motion for class certification, defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment. Also pending is plaintiffs' motion for authorization to submit affidavits (Doc. # 40).

In their complaint, plaintiffs, who bought property in Maumelle, Arkansas, a subdivision owned by defendant DeHaven, Todd & Co., and listed for sale by defendant The Maumelle Company, allege they were induced to purchase property in the subdivision by false promises made by the sales agents, in violation of the Interstate Land Sales Full Disclosure Act (the Act), 15 U.S.C. sections 1701 *et seq.*, and that defendants

failed to provide a property report at the time the agreement to purchase the property was signed, also in violation of the Act; that the representations made by defendants' agents constituted fraud, deceit and misrepresentation; that the defendants are liable for breach of contract in that most of the improvements promised have not been completed; and that the actions of defendants constitute intentional infliction of emotional distress. Plaintiffs request rescission of the promissory notes signed by them, return of the down payments and any other payments made by them, with interest, compensatory and punitive damages and attorney's fees and costs.

The Court will first address the parties' motions for summary judgment. Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Although the moving party has the burden of showing the absence of a genuine issue of material fact, the nonmoving party has the burden of producing "evidence that would support a jury verdict." *Anderson v. Liberty Lobby,* 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment must be granted "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The nonmovant has an affirmative burden "to go beyond the pleadings" and "by affidavit or otherwise" designate "specific facts showing that there is a genuine issue for trial." *Commercial Union Insurance Co. v. Schmidt,* 967 F.2d 270, 271 (8th Cir. 1992) (citations omitted).

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> The non-moving party must establish significant probative evidence to prevent summary judgment. In addition, the court must give the benefit of all favorable inferences to the party opposing summary judgment. In a trilogy of cases, the Supreme Court established that the Rule 56 motion should be interpreted to accomplish its purpose of disposing of factually unsupported claims.

Johnson v. Enron Corp. 906 F.2d 1234, 1237 (8th Cir. 1990) (citations omitted).

> When a party opposing summary judgment fails in its burden, summary judgment "may and should be granted" if the moving party otherwise satisfies the Rule 56(c) requirements. Summary judgment is not to be construed as a "disfavored procedural short-cut" but should be interpreted to accomplish its purpose of isolating and disposing of factually unsupported claims and defenses. Yet the Supreme Court also notes that trial courts should act with great caution and may deny summary judgment when it believes "the better course is to proceed to a full trial."

Commercial Union Insurance Co. v. Schmidt, 967 F.2d at 272.

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence

> and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson v. Liberty Lobby, Inc., supra at 247-50 (citations omitted).

In their motion for summary judgment, defendants argue that beginning June 3, 1989, they were exempted[1] from the requirements of the Act because of their inclusion of a "building provision"[2] in the sales contracts, which bound them to erect a

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1. Section 1702 of the Act provides:

> *Sale or lease of lots generally.*
>
> (a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to
>
> * * *
>
> (2) the sale or lease of any improved land of which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years; . . . .

2. The contract contained the following provision: "Upon Buyer providing (Cont'd)

residential building on the properties sold within two years from the date of the sale.[3]

Plaintiffs also request summary judgment in their favor. They argue that the building provision in defendants' sales contract is insufficient to create the exemption because it did not unconditionally obligate the defendants to build a house for the buyers within a period of two years and it required the buyers to perform several obligations before defendants' duty to build a home on the lot arose. They contend

> the seller's obligation to build a house on the lot is conditioned upon the buyer's providing plans, securing financing, and paying the full cost of the construction of the house plus ten percent. [The] provision also limited the seller's duty to perform within two years if weather conditions were encountered, or if the buyer failed to comply with the

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(Cont'd)
to Seller satisfactory evidence of construction financing, Seller agrees to construct on the lot a residential home in conformity with plans and specifications presented by Buyer prior to two years from the date of this Real Estate Sale and Construction Contract. Buyer shall have the right to specifically enforce this Agreement against Seller or seek damages or any other remedies provided by law for breach of this Agreement by Seller."

3. Defendants further assert that any claim arising before that time is barred by the three year statute of limitations because this action was not filed until July 14, 1992. At the hearing on the motion for summary judgment, plaintiffs stated they were only asking for relief based on claims that arose during the time defendants did not provide the property reports. The Court finds the three year statute of limitations found in 15 U.S.C. section 1711 precludes the litigation of all claims that arose prior to July 14, 1989.

> requirements of that provision. The seller could avoid any responsibility to build a house simply by making it economically unfeasible for the buyer to comply. The Maumelle Company retained the right to select the materials and the labor, which cost could easily be made prohibitive.

In *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 104-05 (3rd Cir. 1990), the court discusses the exemption claimed by defendants in this case and addressed by the "Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act," at 24 C.F.R. Ch. X, Part 1710, App. A (1989).

> While noting that "remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located," the Secretary has provided that "the contract must not allow nonperformance by the seller at the seller's discretion. . . . contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for any reason within the seller's control is not acceptable for use under this exemption. Similarly, contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct. HUD's position is not that a right to

> specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated. *For examples a contract that provides for a refund or damage action as the buyer's sole remedy would not be acceptable.*

Id. (emphasis in original).

The Court first notes that the Act clearly is intended to cover residential property and plaintiffs' argument that the exemption contemplates that "the seller, not the buyer, will undertake the entire obligation to build the building" and that the provision used by the defendants 'merely obligates the seller to enter into another contract to build a house" is untenable. The Court finds that the building provision in the sales contract at issue in the present case was sufficient to create the exemption relied upon by defendants. The Court views the "conditions" cited by plaintiffs as reasonable steps in the actual construction process. The Court does not find these requirements negate the rights of the purchasers. The sales contracts provided the buyers the remedy of specific performance and I find this is sufficient to create the exemption.

Plaintiffs also assert that, if the building provision was sufficient to create the exemption, it is nevertheless a nullity because it was adopted for the purpose of evading the Act. In support of this, plaintiffs present the following:

1. In the case of *Eskola v. The Maumelle Company,* Pulaski Circuit No. 91-2304, a jury found that the defendants adopted the building provision with the intent of evading the Act, that the defendants violated the Act and defendants;

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2. The following deposition testimony of defendant Jay DeHaven, which plaintiffs contend "suggests that he 'assumed that liability' so that he could sell [i.e. with the purpose of selling] his property more competitively":

> A. Because we began selling under an exemption under the Interstate Land Sales Act that basically says that we assume a liability of building a home when the demand is made upon us, therefore, that exemption is valid. And you don't give property reports when you assume that liability.
>
> Q. So —
>
> A. Subsequently, you can — you reduce a lot of costs, so you're able to sell your property more competively.

3. Testimony by Judy Pickens and Mary Peyton in the trial of the *Eskola* case that indicated The Maumelle Company simply referred the property owners to a builder and never actually built a house;

4. Testimony by Jeffery Ellison that he bought a lot from defendants and intended to build a house, but the Maumelle Company did not comply with the building provision;

5. Testimony from Phillip Patterson, the Building Inspector for the City of Maumelle, that where Mr. DeHaven asserted that 507 houses were under construction, the number of housing permits was only 151, which is not a very large number of homes

constructed out of the two thousand or more lots that were sold; and

6. Testimony by Glenn Eskola that defendants' salesmen were willing to remove the building provision if necessary to make a sale.

Plaintiffs also contend that defendants had a strong incentive to stop using the property report because they engaged in a highly structured and developed sales plan to mass market the lots and a property report would have disclosed to purchasers that they had the legal right to cancel the contract by giving notice to the seller within seven days; the future value of land was uncertain and dependent upon many factors; and resale of the lots may be difficult or impossible because of the competition of the sales program and local real estate brokers may not be interested in listing the lot. The report also advised the buyer to seek professional advice before obligating himself or herself.

All parties agree that no court thus far has interpreted the phrase "Unless the method of disposition is adopted for the purpose of evasion of this Chapter. . . ." Plaintiffs define "evasion" as "to escape from by trickery or cleverness" or "to get around by trickery." They also argue that "[t]he plain meaning of the language of the Act is that if the seller adopts a method of selling property that superficially resembles an exempted transaction, but does so with the purpose of skirting the ILSFDA, the law will not give effect to the exemption."

Using plaintiffs' definition, this Court must determine whether the evidence cited by plaintiffs is sufficiently probative to present a genuine issue of fact as to whether the building provision adopted by defendants was mere artifice to escape

punishment under the Act. The Court first notes that many of plaintiffs' assertions contained in their briefs were not supported by references to specific parts of the record. The Court does not view the evidence cited by the plaintiffs as sufficiently probative to survive defendants' motion for summary judgment. First, the *Eskola* case was reversed because of lack of jurisdiction by the trial court. *The Maumelle Co. v. Eskola,* 315 Ark. 25 (1993). Secondly, Mr. DeHavens testimony that the exemption allowed more competitive prices for the properties is not evidence that he intended to evade the Act.

Furthermore, plaintiffs mischaracterized the testimony of Judy Pickens and Mary Peyton. They testified that, although defendants did not actually construct the houses themselves, they worked closely with the lot owners drawing up plans and getting bids from builders.

Plaintiffs also mischaracterized the testimony of Jeffery Ellison. Mr. Ellison was apparently misled by a sales agent into believing he could build a house on his lot for thirty dollars a square foot. He testified that, after he was told he could not build the house from his plans for that price, defendants' agents worked with him and finally drew up plans that would allow him to build a home with monthly payments of $700, which was acceptable to him, but he refused to build when he learned he would have to pay an additional $83 a month in taxes and insurance.

The Court does not view the mere number of houses constructed as probative of the issue. This number necessarily depended upon the number of persons who wanted to build and who submitted plans. There is no evidence in this record, other than Mr. Ellison's situation, that defendants discouraged building or refused to build homes in Maumelle. On the other hand, all of

the defendants testified they encouraged building and that home construction added to the value of the properties. Thus, I find plaintiffs have failed to present "significant probative evidence to prevent summary judgment." *Johnson v. Enron Corp.*, supra.

Given the disposition of plaintiffs' federal claims, the Court declines to exercise supplemental jurisdiction under 28 U.S.C. section 1367.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment be, and it is hereby, granted. Plaintiffs' motion for summary judgment is denied. Plaintiffs' motion for class certification and motion to submit affidavits are denied as moot.

IT IS FURTHER ORDERED that plaintiffs' supplemental claims are dismissed.

SO ORDERED this 15th day of April, 1994.

s/ Henry L. Jones, Jr.
United States Magistrate Judge

APPENDIX E — DEFENDANT'S CONTRACT PROVISION OF THE REAL ESTATE SALE AND CONSTRUCTION CONTRACT

Defendants' contract provision reads, with a few minor changes in various contracts, as follows:

> 6. Construction of Residential Home. Within 180 days of the date hereof, Buyer agrees to provide Seller with detailed plans and specifications of a home (the "Improvements") for construction by Seller on the Lot, consistent with the Bills of Assurance, and otherwise meeting the architectural requirements of the subdivision. Once Buyer's plans and specifications have been determined by Seller to meet the architectural requirements of the subdivision, Buyer shall arrange the construction financing necessary by reason of this agreement to pay the purchase price of the Lot and the improvements set forth below (or, if no construction financing is required by Buyer to pay for the improvements, Buyer shall furnish Seller with satisfactory evidence of their ability to pay the purchase price of the improvements). Upon Buyer providing to Seller satisfactory evidence of construction financing, Seller agrees to construct on the Lot a residential home in conformity with plans and specifications presented by Buyer prior to two years from the date of this Real Estate Sale and Construction Contract. Buyer shall have the right to specifically enforce this Agreement against Seller or seek damages or

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any other remedies provided by law for breach of this Agreement by Seller. The purchase price for the Improvements being constructed by Seller shall be the sum of costs incurred by Seller plus 10% shall be due from Buyer to Seller monthly during construction. The costs of Seller are all costs incurred by Seller for the following items:

(a) Wages paid for labor in the direct employ of the Seller in the performance of the construction work and including such welfare and other benefits, if any, as may be payable with respect thereto;

(b) Costs of contributions, assessments or taxes for such items as unemployment compensation and social security, insofar as such costs are based on wages, salaries or other remuneration paid to employees or independent contractors of the Seller and which are included in the cost of the construction work;

(c) Costs of all materials, supplies and equipment incorporated in the construction work, including costs of transportation thereof;

(d) Costs, including transportation and maintenance of all materials, supplies, equipment, transportation facilities and hand tools now owned by the workmen which are

consumed in the performance of the work, and costs, less salvage value, on such items used but not consumed which remain the property of the Seller;

(e) Rental charges of all necessary machinery and equipment, exclusive of hand tools, used at the site of the construction work, whether rented from the Seller or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs, at rental charges consistent with those prevailing in the area;

(f) Sales, use or similar taxes related to the construction work and for which the Seller is liable imposed by any governmental authority;

(g) Royalties and deposits lost for cause other than the Seller's negligence;

(h) Costs of removal of all debris;

(i) Costs of engineering services; and

(j) Other costs incurred in the performance of the construction work if and to the extent approved in advance in writing by Buyer.

Real Estate Sale and Construction Contract, para. 6 [hereinafter "building provision"].